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The Validity of a Marriage under the Conflict of Laws

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THE VALIDITY OF A MARRIAGE UNDER THE CONFLICT OF LAWS

"Marriage lies at the bottom of all government".

CONFUCIUS: The Book of Rites, XXIV (500 B. C.)

The major problem in regard to the marriage relationship itself, so far as it will arise in the area of conflict of laws, is that of validity. Is a marriage celebrated in North Dakota valid in Alabama? Which law is applicable to determine validity? These are the questions with which this paper will be concerned.

The problem itself is likely to arise under three general situations: (1) when an action for divorce, separation or annulment is commenced; (2) in probate proceedings, when a claim is made as widow or widower of the decedent; (3) when a criminal action for desertion, nonsupport, bigamy, adultery, or illicit cohabitation is brought against one or both of the supposed spouses. Under these situations the problem loses the abstract character it might assume under a latin phrased conflict of laws rule and becomes very real indeed.

THE RELATIONSHIP DEFINED

Necessarily, in any attempt at analysis of a legal relationship we must start by defining our terms. Marriage, a complex human relation at best, when viewed from its legal aspect alone has been variously defined as: a contract,[1] an institution,[2] a status.[3] An example of legal analysis carried to a doubtful conclusion is the definition of the early rationalistic school. They defined marriage as a partnership, the object of which was the begetting of children.[4] However, in choosing among these definitions it should be explained that the civil contract analysis is the traditional common law approach followed since Blackstone.[5] The concept of marriage as a status[6]

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1. E. g. Bailey v. State, 36 Neb. 808, 55 N.W. 241 (1893).; STORY, CONFLICTS OF LAW § 108 (8th ed. 1883).
2. E. g. Wis. Stat. Ann. Family Code § 245.
3. E. g. RESTATEMENT, CONFLICTS OF LAW § 119, comment (1934).
4. JACOBS AND GOEBEL, DOMESTIC RELATIONS 44 (4th ed. 1961).
5. 1 BLACKSTONE, COMMENTARIES 433 (Lewis ed. 1897).

is the more modern approach taken by the Restatement.

Even among that great majority of American jurisdictions tying their concept of marriage to the civil contract analogy it has been found necessary to broaden the definition to include the public interest, or the interest of the state, in the marriage relation.[7] In effect this means three parties must be considered to have corresponding interests: the husband, the wife, and the state. For practical purposes the analysis of Mr. Clad appears most accurate: "In reality, it is something of a combination between a statute and a contract, if we must press it into the mold of some specific legal concept."[8] In viewing marriage in this manner we are taking into account both its consensual nature and the third party interest which is involved.

THE CONFLICT OF LAWS RULE

The traditional concept of marriage has carried over into its application in the conflict of laws and the consistent statement of the rule is that a marriage valid where contracted is valid everywhere—the *lex loci contractus*.[9] In like manner the converse may be applied holding marriages invalid where performed invalid everywhere.[10]

An example of the rule as it is so often judicially stated is the following from the Virginia Supreme Court:

> "[T]he general rule is that a marriage valid where performed is valid everywhere; but there are exceptions to the rule as well established as the rule itself. These exceptions are generally embraced in two classes: First, marriages deemed contrary to the law of nature as generally recognized in Christian countries, and include only those that are void for polygamy or incest; second, mar-

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6. ". . . a legal personal relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third persons and the state are concerned." RESTATEMENT, CONFLICTS OF LAW § 119 (1934).

7. Willits v. Willits, 76 Neb. 228, 107 N.W. 379, 380-381 (1906) "While our law defines marriage as a civil contract, it differs from all other contracts in its far-reaching consequences to the body politic itself, and for that reason in dealing with it or the status resulting therefrom, the state never stands indifferent but is always a party whose interest must be taken into account."; Ritzer v. Ritzer, 243 Mich. 406, 220 N.W. 812, 813 (1928) "While marriage is in a very important sense a contract, it is also a relation governed by the rules of public policy which apply to no mere private agreements."

8. CLAD, AMERICAN LAW INSTITUTE—FAMILY LAW 3 (1958).

9. **E. g.**, McDonald v. McDonald, 5 Cal.2d 457, 58 P.2d 163 (1936); Hills v. State, 61 Neb. 589, 85 N.W. 836 (1901); STORY, CONFLICTS OF LAW § 113 (8th ed. 1883).

riages forbidden by statute because contrary to the public policy of the state."[11]

It remains to be biologically proven that the "laws of nature" vary from Christian to non-Christian countries. However, the greater criticism of the rule lies in its second exception. The concept of local public policy tends to be the overriding area for judicial nullification of foreign marriages and this is a nebulous and uncertain concept. The Restatement has attempted to restrict its use by limiting it, in certain cases, to "strong public policy".[12]

While it has not yet had a major impact upon judicial decision, a substituted approach has found strong advocates among authorities in this field of conflict of laws.[13] These writers would apply the law of the "intended marital domicile" to determine validity. Under this concept the law of one state alone should be applicable for such a determination as to any given marriage. There should be no questions of conflict between state policies rendering a marriage valid in one jurisdiction invalid in another. The rule bears much in common with the "substantial connection" or "points of contact" doctrine, which is the modern approach to contracts in the conflict of laws.[14] Both of these approaches rely upon the law of that jurisdiction in which the legal relation has the greatest effect.

APPLICATION OF THE RULE

Having examined the rule itself we can best test its success by considering the situations in which it is applied. The great majority of problems arising where foreign marriages are questioned may be grouped under eight headings.

(1) The miscegenous marriage.
(2) The incestual marriage.
(3) The polygamous marriage.
(4) The common law marriage.

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10. Schaffer v. Krestovnidow, 88 N.J.Eq. 192, 102 Atl. 246 (1917); Huard v. McTeigh, 113 Ore. 279, 232 Pac. 658 (1925); Kitzman v. Kitzman, 167 Wis. 308, 166 N.W. 789 (19183; RESTATEMENT, CONFLICT OF LAWS § 122 (1934); see also Lariviere v. Lariviere, 102 Vt. 278, 147 Atl. 700 (1929).
11. Heflinger v. Heflinger, 136 Va. 289, 118 S.E. 316, 320 (1923).
12. RESTATEMENT, CONFLICT OF LAWS § 132 & comment (1934).
13. Taintor, **Marriage in the Conflict of Laws,** 9 Vand. L. Rev. 607 (1956); CHESHIRE, PRIVATE INTERNATIONAL LAW 305, 320 (5th ed. 1957).
14. See Lorenzen, **Validity and Effects of Contracts in the Conflict of Laws,** 30 Yale L.J. 655 (1921); 2 RABEL, CONFLICT OF LAWS 480 (1947); GOODRICH, CONFLICT OF LAWS 328-329 (3rd ed. 1949). An adaptation of this view is expressed in RESTATEMENT (SECOND), CONTRACTS § 332 **et. seq.** (Tent. Draft no. 6, 1960).

(5) The proxy marriage and marriage by correspondence.

(6) Marriage contrary to a eugenics or health restriction statute.

(7) Remarriage contrary to a restrictive divorce decree or statute.

(8) Marriage by parties not of legal age.

The problem may be narrowed somewhat by noting that domicil is intrinsically tied to the marriage relationship under Anglo-American law. So far as can be ascertained, no American court has applied its law to invalidate an extra-state marriage where the parties, at the time of the marriage, did not intend to and did not live in the state of the forum.[15] The typical decision turns upon a situation where a resident or residents of the forum marry out of state and immediately return. The court of the forum is later called upon to determine the validity of the marriage.

Also excluded from consideration are the marriage licensing statutes and the effect of noncompliance since these statutes appear to be universally construed as directory only and not a basis for invalidating a marriage, or are construed to have no extra-territorial effect.[16] The courts feel the compulsive force of these statutes is effected merely through their penal provisions.[17]

Miscegenous Marriages. A surprising total of twenty-four states retain statutory and constitutional restrictions upon interracial marriage.[18] The strong cultural feelings expressed by

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15. See Taintor, **supra** note 13, at 613 where he makes the same observation as of that date.

16. Lyannes v. Lyannes, 177 Wis. 381, 177 N.W. 683 (1920); Noble v. Noble, 299 Mich. 565, 300 N.W. 885 (1941); see generally Annot., 62 A.L.R.2d 847 (1958). Under English law marriage by license is recognized as an alternative form of marriage and the requirement is mandatory. In Europe the requirement of publishing banns takes the place of license requirements. Mueller, **International Choice of Law to Determine the Validity of Marriages,** 2 Howard L.J. 21, 24 (1956).

17. **E. g.,** N.D. Cent. Code § 14-03-25 "Every person who attempts to join in marriage or to perform the marriage ceremony for another within this state without being authorized by law so to do shall be punished as provided in section 14-03-28." ($50 to $500, or 30 days to one year, or both).

18. Ala. Code Ann. 14 § 360, 361 (1958), Const. vol. 1, § 102; Ariz. Rev. Stat. Ann. § 25-101(a) (1956); Ark. Stat. Ann. § 55-104 (1947); Del. Code Ann. 13 § 101(a) (1953); Fla. Stat. Ann. § 741.11 to 15 (1940), Const. Art. 16 § 25; Ga. Code Ann. § 53-106 (1961); Ind. Ann. Stat. § 44-104, 105 (1958); Ky. Rev. Stat. § 402. 020(2) (1959); La. Rev. Stat. Ann. § 9:201, § 14:79 (1950); Md. Code Ann. 27 §§ 393, 398; 62 § 16 (1957); Mich. Comp. Laws § 551.6 (1948); Miss. Code Ann. § 459 (1956) Const. 263 §§ 2339, 2002; Mo. Ann. Stat. § 451.020 (1952); Neb. Rev. Stat. § 42-103 (1960); N.C. Gen. Stat. § 51-3 (1950); Okla. Stat. 43 § 12 (1951); Ore. Rev. Stat. § 106.210 (1959); S.C. Code § 20-7 (1952); Tenn. Code Ann. § 36-402, 403 (1955); Tex. Civ. Stat Ann. 4607, P.C. 492-495 (1960); Utah Code Ann. § 30-1-2 (1953); Va. Code Ann. §§ 20-54, 57 (1960); W.Va. Code Ann. § 4697 (1961); Wy. Stat. Ann. §§ 20-18, 19 (1957). North Dakota repealed its miscegenation law (N.D. Rev. Code § 14-0304 (1943) in 1955. (Laws of N.D. 1955, ch. 126 § 1).

these statutes have necessarily led to their application in the area of public policy.[19] The courts of these jurisdictions have held void marriages of their domiciliaries even though the miscegenous marriage was valid in the jurisdiction where contracted.[20] However, it is necessarily implied that the parties to the marriage were, at the time of the marriage, domiciliaries of the forum, for the miscegenation laws are not construed to have extra-territorial effect.[21] Though the forum may prohibit miscegenous marriages, a valid marriage contracted in another state when the parties were not residents of the forum will be recognized as valid.[22] This validation includes situations where the parties had been previously domiciled in the forum but married out of state, set up a new domicil, and later returned to the forum.[23]

With the decision of the California Supreme Court in *Perez v. Sharp*[24] declaring California's miscegenation law unconstitutional the public policy embodied in such statutes might well be considered doubtful. Yet two Southern courts have since upheld the constitutionality of local miscegenation laws.[25]

Incestuous Marriages. Prohibitions against marriages considered incestuous by reason of consanguinity (blood relation-

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19. "I do not hesitate to say that it (the Georgia miscegenation law) was dictated by wise statesmanship, and has a broad and solid foundation in enlightened policy, sustained by reason and common sense. The amalgamation of the races is not only unnatural but it is always productive of deplorable results. Our daily observations show us that the offspring of these unnatural connections are generally sickly and effeminate, and that they are inferior in physical development and strength to the full blood of either race. . . (These marriages). . . are productive of evil, and evil only, without any corresponding good." Georgia v. Tutty, 41 Fed. 753 (C.C. Ga. 1890) citing Scott v. State, 39 Ga. 321. The biological analysis may have been refuted but the strong feeling remains. (See Naim v. Naim, 197 Va. 30, 37, 87 S.E.2d 749, 756 (1955)).

20. Stevens v. United States, 146 F.2d 120 (10th Cir. 1944); Re Takahashi, 113 Mont. 490, 129 P.2d 217 (1942); State v. Kennedy, 76 N.C. 251, 22 Am. Rep. 683 (1877); Eggers v. Olson, 104 Okla. 297, 231 Pac. 483 (1924); Naim v. Naim, 197 Va. 80, 87 S.E.2d 749 (1955).

21. Re Takahashi, **supra** note 20 (The statute's application must necessarily be limited to marriages contracted while the parties remained domiciliaries of Montana); Miller v. Lucks, 36 So. 2d 140 (Miss. 1948) (The miscegenation law has no extra-territorial effect.).

22. People v. Godines, 17 Cal. App. 2d 721, 62 P.2d 787 (1936); Whittington v. McCaskill, 65 Fla. 162, 61 So. 236 (1913); Miller v. Lucks, 36 So. 2d 140 (Miss. 1948); State v. Ross, 76 N.C. 242, 22 Am. Rep. 678 (1877); but see State v. Bell, 7 Baxt. (Tenn.) 9, 32 Am. Rep. 549 (1872) (Invalidation of the marriage when the parties were apparently not residents of Tennessee).

23. State v. Ross, 76 N.C. 242, 22 Am. Rep. 678 (1877).

24. 32 Cal. 2d 711, 198 P.2d 17, 29 (1948) "In summary, we hold that sections 60 and 69 are not only too vague and uncertain to be enforceable regulations of a fundamental right, but that they violate the equal protection of the laws clause of the United States Constitution by impairing the right of individuals to marry on the basis of race alone and by arbitrarily and unreasonably discriminating against certain racial groups."

25. Jackson v. State, 37 Ala. App. 519, 72 So. 2d 114 (1954) **cert. den.** 260 Ala. 698, 72 So. 2d 116 (1954) **cert. den.** 348 U.S. 888 (1954); Naim v. Naim, 197 Va. 80, 87 S.E.2d 749 (1955).

ship) or affinity (relationship by marriage) have a long history. The common law source can be found in the proscriptions of the levitical decrees which begin with the colorful language: "None of you shall approach to any that is near of kin to him, to uncover their nakedness . . ."[26] The levitical decrees included the relationship of affinity as well as consanguinity and the foreign marriage of those related by marriage was found invalid in England.[27] However questions of affinity never received serious condemnation in the United States and therefore a valid foreign marriage contrary to such a statutory restriction has been generally upheld in the forum.[28] As to consanguinity the courts in like situations have more willingly applied either the "law of nature" or "public policy" exceptions to marriages of their domiciliaries. In the majority of such instances the exceptions were found not applicable and the marriage was upheld.[29]

Of considerable importance in such cases is the working of the prohibition statute. Such statements as "shall be absolutely void" impress the courts as more likely expressions of strong local policy than mere general prohibitions.[30] However, even strong statutory language is insufficient to allow a court to disallow a foreign marriage of parties not domiciled in the forum at the time of the marriage.[31]

Polygamous Marriages. Story stated that polygamous or "non-Christian" marriages were one exception to the rule that

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26. Leviticus 18:6.

27. **E. g.,** Brook v. Brook, 9 H.L.C. 193 (1861) held invalid the marriage of a man to his deceased wife's sister while in Denmark. The statute in regard to such marriages was changed in 1907 however. (6 Edw. VII c. 47 § 1).

28. Dannelli v. Dannelli, 67 Ky. 51 (1868); Tyler v. Andrews, 40 App. D.C. 100 (1913). **But cf.** Osinach v. Watkins, 235 Ala. 564, 180 So. 577 (1938) Here the court found the incestuous marriage statutes to be sufficiently ferocious to indicate a public policy invalidating the marriage of a man to his uncle's widow.

29. Finsterward v. Burk, 129 Md. 131, 98 Atl. 358 (1916) **cert. den.** 248 U.S. 292 (1918) (uncle-niece marriage); **In re** Miller's Estate, 239 Mich. 455, 214 N.W. 428 (1927) (first cousins); Mazzolini v. Mazzolini, 168 Ohio St. 357, 155 N.E.2d 206 (1958) (first cousins). **Contra,** Bucca v. State, 43 N.J. Super. 315, 128 A.2d 506 (1957); see also Mortenson v. Mortenson, 83 Ariz. 87, 316 P.2d 1106 (1957) (marriage evasion statute); Meisenhelder v. Chicago & N.W. Ry. Co., 170 Minn. 317, 213 N.W. 32 (1927) (marriage evasion statute).

30. See Bucca v. State, **supra** note 29. Under a statute declaring such a marriage "absolutely void" a foreign marriage was nullified. In **In re** Miller's Estate, **supra** note 29, under a general statutory prohibition the foreign marriage was upheld. In Mazzolini v. Mazzolini, 168 Ohio St. 357, 155 N.E.2d 206 (1958) the same result was reached.

31. Garcia v. Garcia, 25 S.D. 645, 127 N.W. 586 (1910). The South Dakota statute declared such a union "incestuous and void from the beginning". The court refused to allow this expression of public policy to void the marriage. The forum could not declare a marriage void by the law of their present domicil when both the domicil at the time of the marriage and the place where the marriage was contracted were foreign jurisdictions. See also Meisenhelder v. Chicago & N.W. Ry. Co., 170 Minn. 317, 213 N.W. 32 (1927).

a marriage valid where performed is valid everywhere.[32] This statement of the first authority in the field has been often repeated by the courts but found little place for actual application. In England it has been held that such unions are not valid "marriages".[33] Yet in the United States recognition has been accorded the informal, often polygamous, marriages of various Indian tribes.[34] In fact, Hindu and Moslem marriages which were "potentially polygamous", in that the husband could take another wife but had not yet done so, have been given full credit in the United States.[35] With the progressive internationalization of our society the problem will become less academic. An adequate solution will require more than narrow moral pretensions and likely will entail recognition of such marriages.

Common Law Marriages. Marriage by the common law forms was of two types: *per verba de presenti* (by present agreement to be married) and *per verba de futuro cum copula* (by agreement on future marriage coupled with subsequent sexual intercourse). The distinctions have tended to become lost in their American application. Yet at latest count seventeen states and the District of Columbia recognize the "common law" or nonceremonial marriage in some form.[36] Thirty-three states refuse it recognition.[37] Among students of the subject, including the American Bar Association and the Commission on Uniform State Laws, there is impressive unanimity for its abolition.[38]

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32. STORY, CONFLICT OF LAWS § 113(a) (8th ed. 1883). See also Earle v. Earle, 141 App. Div. 611, 126 N.Y.S. 317 (1910).

33. **In re** Bethell, 38 Ch. Div. 220 (Eng. 1889).

34. Yakima Joe v. To-is-Lap, 191 Fed. 516 (C.C.D. Ore. 1910); Moore v. Jackson Iron Co., 76 Mich. 498, 43 N.W. 602, 605 (1889) "While most civilized nations in our day very wisely discard polygamy . . . yet it is a recognized and valid institution among many nations, and in no way universally unlawful." See generally GOODRICH, CONFLICT OF LAWS § 120 (3rd ed. 1949).

35. Application of Sood, 142 N.Y.S.2d 591 (Sup. Ct. 1955) (Hindo marriage); Royal v. Cudahy Packing Co., 195 Iowa 759, 190 N.W. 427 (1922) (Mohammedan marriage—potentially polygamous—upheld).

36. Alabama, Alaska, Colorado, Florida, Georgia, Idaho, Iowa, Kansas, Michigan, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas. JACOBS AND GOEBEL, DOMESTIC RELATIONS 93 (4th ed. 1961).

37. Arizona, Arkansas, California, Connecticut, Delaware, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming. JACOBS & GOEBEL, DOMESTIC RELATIONS 93 (4th ed. 1961). See Schumacher v. G.N. Ry. Co., 23 N.D. 231, 136 N.W. 85 (1912) as to the status of common law marriage in North Dakota.

38. See GROVES, THE CONTEMPORARY AMERICAN FAMILY 540-541 (1947) "The common law union debases conventional marriage and encourages deceit and vice . . . So long as common law marriage is recognized, there is opportunity for blackmail and for a woman who has been mistress

In a jurisdiction not recognizing common law marriage such a marriage contracted outside the state is usually given recognition by applying the general rule and the *lex loci celebrationis*.[39] Where the parties are domiciliaries and go outside the state to contract the marriage, returning without a change of domicil, the marriage may be held void.[40] The result may be based upon local public policy or a local statute declaring such marriages void.[41] There is, even so, strong authority for upholding the marriage under these circumstances.[42]

There is also a problem with regard to cohabitation and holding out to the public as man and wife. Some courts feel these are essential to a common law marriage, while others consider them only evidentiary. If cohabitation is an essential part of the form both the exchange of consents and cohabitation must be in a state recognizing common law marriage.[43] If cohabitation and repute are merely evidentiary then their locus can make no difference.[44] Since it is usually difficult to determine whether the holding out is evidentiary or substantive very casual contacts with a state have been held to validate such a marriage.[45]

Marriages by Proxy or Correspondence. "A corollary of the classical doctrine that consensus is sufficient to bring into being the marriage relation has been the principle, long seated in civil law countries, that a valid marriage can be celebrated by proxy."[46] Marriage by correspondence is, in effect, merely a variation of the proxy situation with the added difficulty that no solemnization can take place. The proxy marriage[47] and

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of a man to claim after his death a share of his estate as his legal wife. It is also true that when the court decides that there has been a common law marriage, a later union of one of the two concerned is rendered bigamous, and if any children have been born they become illegitimate."

39. Tatum v. Tatum, 241 F.2d 401 (9th Cir. 1957); Pierce v. Pierce, 399 Ill. 185, 39 N.E.2d 990 (1942); Gilbert v. Gilbert, 275 Ky. 559, 122 S.W.2d 137 (1938) (dictum); Shea v. Shea, 294 N.Y. 909, 63 N.E.2d 113 (1945); Abbott v. Industrial Commission, 80 Ohio App. 7, 74 N.E.2d 625 (1946); RESTATEMENT, CONFLICT OF LAWS § 123 (1944).

40. **In re** Veta's Estate, 110 Utah 187, 170 P.2d 183 (1946); **In re** Van Schaick's Etate, 256 Wis. 214, 40 N.W.2d 588 (1949) (evasion statute).

41. If the local marriage is declared void § 132(d) of the Restatement may be applied to invalidate it as to domiciliaries.

42. Tatum v. Tatum, 241 F.2d 401 (9th Cir. 1957); Shea v. Shea, **supra** note 39.

43. Ferraro v. Ferraro, 77 N.Y.S.2d 246 (Dom.Rel. Ct. 1948).

44. Brown's Adm's v. Brown, 308 Ky. 796, 215 S.W.2d 971 (1948); Franzen v. Equitable Life Assur. Soc., 130 N.J.L. 457, 33 A.2d 599 (Sup.Ct. 1943).

45. Madwell v. United States, 84 F. Supp. 329 (E.D. Tenn. 1949) (living for several months); **In re** Singer's Estate, 138 N.Y.S.2d 740 (Surr.Ct. 1955) (honeymooning). See also Gilbert v. Gilbert, 275 Ky. 559, 122 S.W.2d 137 (1938) (short visit).

46. JACOBS & GOEBEL, DOMESTIC RELATIONS 120 (4th ed. 1961).

47. **In re** Valente's Will, 18 Misc. 2d 701, 188 N.Y.S.2d 732 (1959); United States v. Layton, 68 F. Supp. 247 (S.D. Fla. 1946); Hardin v. Davis, 16 Ohio

marriage by correspondence[48] have been held valid in several jurisdictions and are probably valid in many others. There is authority for holding them valid in any jurisdiction which recognizes common law marriage.[49] But those courts requiring cohabitation for recognition of common law marriages would hardly be satisfied. The applicable law under the marriage by proxy is the *lex loci celebrationis*,[50] for marriage by correspondence, the law of the state from which the acceptance is dispatched.[51] If the marriage is valid by that law it should be valid everywhere.[52]

Eugenic Restrictions. For centuries a valid marriage has been based upon certain requisites of form and substance. The present trend, for eugenic, social or economic reasons is to add certain other requirements before a marriage can be legally established. The two subsequent sections view additional restrictions on age and remarriage. This section will concern itself with those health restrictions which more and more states have found necessary for the welfare of their present and future citizens.[53] Such marriage laws have been construed as having no extra-territorial effect[54] particularly since they seldom declare such a marriage void.[55] Yet in a foreign marriage of its domiciliaries where both states involved had prohibitions regarding the marriage of epileptics, the Supreme

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Supp. 19 (1945). See United States v. Barrons, 91 F. Supp. 319 (N.D. Cal. 1950).

48. Great Northern Ry. v. Johnson, 254 Fed. 683 (8th Cir. 1918).

49. United States v. Layton, **supra** note 47.

50. Ferraro v. Ferraro, 77 N.Y.S.2d 246 (Dom. Rel. Ct. 1948); United States v. Barrons, **supra** note 47; RESTATEMENT, CONFLICT OF LAWS § 124 (1934).

51. United States v. Layton, 68 F. Supp. 247 (S.D. Fla. 1946); RESTATEMENT, CONFLICT OF LAWS § 125 (1934).

52. RESTATEMENT, CONFLICT OF LAWS §§ 124, 125 (1934).

53. **E.g.** N.D. Cent. Code § 14-03-12 (1961) requires a serological test for syphilis. "No person who is so afflicted is entitled to marry." N.D. Cent. Code § 14-03-07: "Marriage by woman under the age of 45 years or by a man of any age unless he marries a woman over the age of 45 years is prohibited if such a man or woman is a chronic alcoholic, an habitual criminal, an imbecile, a feebleminded person, an idiot, an insane person, a person who has been afflicted with hereditary insanity or with any contagious venereal disease."

54. Lyannes v. Lyannes, 177 Wis. 381, 177 N.W. 683 (1920). See also Johnson v. Johnson, 104 N.W.2d 8 (N.D. 1960) where a North Dakota resident and alcoholic married in Minnesota. The court applied North Dakota law under the evasion statute then upheld the marriage on the question of unsound mind without considering the eugenic question.

55. Boysen v. Boysen, 301 Ill. App. 573. 23 N.E.2d 231, 234, (1939): "In Illinois the general rule is that unless the statute expressly declares a marriage contracted without the necessary consent of the parties, or other requirements of the statute, to be a nullity, such statutes will be construed as directory only . . . the marriage is valid although disobedience of the statute may entail penalties on the licensing or officiating authorities." The same general practice of validating the marriage but penalizing the violator prevails in Europe. Mueller, **International Choice of Law to Determine the Validity of Marriages,** Howard L.J. 21, 25-27 (1956).

Court of Wisconsin voided the marriage on a public policy basis.[56]

Remarriage Restrictions. In an attempt at eliminating the "progressive polygamy" occasioned by divorce followed by immediate remarriage — often apparently *ad infinitum* — a majority of the states have enacted statutes limiting the right to marry again.[57] Though there is great variation in detail the two general methods involve (1) postponing the decree officially dissolving the divorce for purposes of remarriage (2) a prohibition against remarriage for a stated period. The limitation may apply to both parties or to guilty party alone and may also be discretionary with the trial judge.[58] Where the divorce decree is conditional or interlocutory and to become final after a stated period remarriage in another state during this period is void.[59] The reasoning is simple—the original parties are still married and the subsequent marriage is bigamous. However the distinction may often be very narrowly drawn between an interlocutory effect and a prohibition.[60]

Where a domiciliary of the forum remarries in another state contrary to the provisions of a prohibitionary statute or decree the courts are in disagreement as to the validity of the marriage.[61] The question of validity of the marriage even if contracted within the state is essentially one of statutory interpretation. "[T]he marriage itself is not void unless the stat-

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56. Kitzman v. Kitzman, 167 Wis. 308, 166 N.W. 789 (1918). With the present state of medical knowledge concerning epilepsy this would seem a doubtful public policy.

57. See generally II VERNIER, AMERICAN FAMILY LAWS § 92 (1931) & Supp. (1948).

58. **E.g.** N.D. Cent. Code § 14-05-02 (1961): "The effect of a judgment decreeing a divorce is to restore the parties to the state of unmarried persons, but neither party to a divorce may marry except in accordance with the decree of the court granting the divorce. It shall be the duty of the court granting a divorce to specify in the order for judgment whether either or both of the parties shall be permitted to marry, and if so, when. The court shall have jurisdiction to modify the decree of divorce at any time so as to permit one or both of the parties to marry, if in his discretion he shall deem it right."

59. Brand v. State, 242 Ala. 15, 6 So. 2d 446 (1941); Earle v. Earle, 141, App. Div. 611, 126 N.Y.S. 317 (1910); Atkinson v. Sovereign Camp, 90 Okla. 154, 216 Pac. 467 (1923); Heflinger v. Heflinger, 136 Va. 289, 118 S.E. 316 (1923); White v. White, 167 Wis. 615, 168 N.W. 704 (1918). **Cf.** Baker v. Abrhams, 73 Colo. 515, 216 Pac. 259 (1923).

60. No Reference—Eliminated by printer to expedite production.

61. The following hold the marriage void: Lanham v. Lanham, 136 Wis. 360, 117 N.W. 787 (1908) (statutory prohibition against remarriage for one year); Harvey v. State, 31 Okla. Cr. App. 229, 238 Pac. 863 (1925) (dictum) (6 month statutory prohibition against remarriage); Mauer v. Mauer, 163 Pa. Super. 264, 60 A.2d 440 (1948) (prohibition against remarriage to paramour). The following hold the marriage valid: Loughran v. Loughran, 292 U.S. 216, (1933) (prohibition against remarriage of guilty party); **In re** Palmer's Estate, 192 Misc. 385, 79 N.Y.S.2d 404 (1949) (prohibition against remarriage to paramour).

ute itself so makes it . . ." Logically this should be the first requisite for invalidating a foreign marriage. Yet the courts have held such foreign marriages void under the magic phrase "public policy" with a mere general prohibition in the statute.[63] The most consistent rule to be gathered from the cases is: if the statute merely declares remarriage prohibited—as opposed to void—the extra-territorial marriage is valid.[64] Where the marriage is expressly declared void, the out of state marriage is invalid.[65] In thus validating the marriage the courts offer as reasoning that the statute does not purport to be extra-territorial in effect and that it simply does not declare the marriage void. In voiding a marriage the courts once again apply "public policy".

While most of the above discussion relates to situations where the court of the domicil is considering the validity of an out of state marriage of its domiciliaries, a subsequent state where the parties are domiciled may also rule on validity and should base its decision on the law of the domicil of the parties at the time of the marriage.[66]

Nonage. The problem of under age marriage together with the remarriage restriction have created the greatest bulk of conflicts litigation in this area. Youthful marriage and its relative increase have become more and more of a social problem. The distinction to be gleaned from the cases in this area is a stronger emphasis upon the ever-present presumption of validity as to a purported marriage.

In the usual situation, under age residents of the forum marry in another state with lower age requirements and then return. Here the court of the domicil will usually apply the

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62. Plummer v. Davies, 169 Okla. 374, 36 P.2d 938 (1934) (This case analyzes the various statutory provisions); Horton v. Horton, 22 Ariz. 490, 198 Pac. 1105 (1921); Dudley v. Dudley, 151 Iowa 142, 130 N.W. 485 (1911); Fisch v. Marler, 1 Wash. 2d 698, 97 P.2d 147 (1934).

63. Maurer v. Maurer, 163 Pa. Super. 264, 60 A.2d 440 (1948) (marriage to paramour). Note that in **In re** Palmer's Estate, 192 Misc. 385, 79 N.Y. S.2d 404 (1949) an exactly opposite result was reached, even though the marriage took place in Pennsylvania.

64. Loughran v. Loughran, 292 U.S. 216, (1933); Horton v. Horton, 22 Ariz. 490, 198 Pac. 1105 (1921); Griswold v. Griswold, 23 Colo. App. 365, 129 Pac. 560 (1913); Dudley v. Dudley, 151 Iowa 142, 130 N.W. 485 (1911); **In re** Kinkead's Estate, 239 Minn. 27, 57 N.W.2d 628 (1953); Fisch v. Marler, 1 Wash. 2d 698, 97 P.2d 147 (1934). **But see** note 62.

65. **In re** Kinkead's Estate, **supra** note 64; Harvey v. State, 31 Okla. Cr. App. 229, 238 Pac. 862 (1925) (dictum); Hall v. Industrial Commission, 165 Wis. 364, 162 N.W. 312 (1917).

66. Hall v. Industrial Commission, **supra** note 65 (applying Illinois law since the public policy was the same); Fisch v. Marler, 1 Wash. 2d 698, 97 P.2d 147 (1934) (applied and construed Idaho law).

general rule of *lex loci celebrationis* and uphold the marriage.[67] This rule has even been extended to situations where the statute of the forum declared such marriages "absolutely void".[68] Another method of validation is through a finding that the law of the forum is directory only.[69] That minority of jurisdictions which would invalidate these marriages hold the question to be decided by the law of the domicil.[70] They color their argument with a tinge of public policy.

In those cases where one or both of the parties were under age at the place where the marriage was contracted but of age at the domicil the courts have also found means to uphold the marriage. The usual finding is that the marriage was merely voidable where contracted and does not meet the annulment requirements of the forum.[71] It is also possible that local public policy evidenced by the age statute might be applied to validate such a marriage.[72] One author has analyzed the courts' approach to nonage marriages as an alternative reference method for upholding them.[73]

While the American cases seldom differentiate between minimum marriageable age and lack of parental consent,[74] in England a distinction has been made. Marriageable age is a question of capacity to be governed by the law of the husband's domicil.[75] Parental consent is classified as a question of form, to be governed by the law of the place where the marriage was contracted.[76]

EVASION STATUTES

The problem of evasion of the domicil's laws through out-

67. State v. Graves, 228, Ark, 378, 307 S.W.2d 545 (1957); McDonald v. McDonald, 6 Cal. 2d 457, 58 P.2d 163, (1936); Payne v. Payne, 121 Colo. 212, 214 P.2d 495 (1950); Mangrum v. Mangrum, 310 Ky. 226, 220 S.W.2d 406 (1949). See also Levy v. Downing, 213 Mass. 334, 100 N.E. 638 (1913).

68. State v. Graves, **supra** note 67.

69. Needam v. Needam, 183 Va. 681, 33 S.E.2d 288 (1943).

70. Wilkins v. Zelichowski, 26 N.J. 370, 140 A.2d 288 (1943); Mitchell v. Mitchell, 63 Misc. 580, 117 N.Y.S. 671 (1909); Ross v. Bryant, 90 Okla. 300, 217 Pac. 364 (1923).

71. Capossa v. Calonna, 95 N.J.Eq. 35, 122 Atl. 378 (Ch. 1923) **aff'd** 96 N.J.Eq. 385 N.J.Eq. 385, 124 Atl. 760 (1924); Parks v. Parks, 218 N.C. 245, 10 S.E.2d 807 (1940) (concurring opinion); Portwood v. Portwood, 109 S.W. 2d 515 (Tex. Civ. App. 1937) (The annulment of a voidable marriage like divorce is governed by the law of the domicile). **Contra,** Cruickshank v. Cruickshank, 82 N.Y.S.2d 522 (Sup.Ct. 1948).

72. See DeFur v. DeFur, 156 Tenn. 634, 4 S.W.2d 341 (1928). The lower courts upheld the marriage on the basis of public policy but since the statutory age had been raised in the interim, the Supreme Court reversed.

73. Note, **Choice of Law in Annulment for Non-age,** 49 Colum. L. Rev. 693, 695 (1949).

74. **But see,** Needam v. Needam, 183 Va. 681, 33 S.E.2d 288 (1943) holding the parental consent requirement directory only.

75. Pugh v. Pugh, Prob. 482, 2 All Eng. 680 (1951).

76. Ogden v. Ogden, Prob. 46 (Eng. 1908).

of-state marriages was early recognized. Various states attempted statutory solutions and, in their usual effort toward unanimity, the Commissioners on Uniform State Laws approved a Uniform Marriage Evasion Law (U.M.E.L.) in the year 1912. The Act was subsequently adopted in only five states.[77] The Commissioners withdrew the Act in 1943 since so few states had adopted it as to multiply rather than curb confusion.[78] The Act operates to nullify out of state marriages by a resident where the marriage would be declared void if contracted within the state.[79] The converse is also applied to nullify marriages by nonresidents within the state when their domicil declares such a marriage void.[80]

In addition, a substantial number of states have varying marriage evasion statutes,[81] often applying the principle used in the first section of the U.M.E.A. However, those statutes directly following the Uniform Act do not have the wide reach originally thought since they apply only to marriages "declared void" by the domicil. Thus, an extra-state marriage contrary to local licensing, eugenics, incestual marriage, or nonage statutes may still be upheld in the domicil,[82] unless it is expressly declared void.[83] Where the evasion statute uses broader language its application may be extended beyond these statutorily "void" marriages.[84]

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77. Illinois, Louisiana, Massachusetts, Vermont, Wisconsin.

78. See JACOBS & GOEBEL, DOMESTIC RELATIONS 72 (4th ed. 1961) for further explanation.

79. U.M.E.A. § 1.

80. **Id.,** § 2.

81. See **e.g.** N.D. Cent. Code § 14-03-08 (1961): "All marriages contracted outside of this state, which are valid according to the laws of the state or country where contracted, shall be valid in this state. This section shall not apply when residents of this state contract a marriage in another state which is prohibited under the laws of North Dakota." See I VERNIER, FAMILY LAWS § 45 (1931) listing 17 states and the District of Columbia as having some form of evasion statute.

82. Boysen v. Boysen, 301 Ill. App. 573, 23 N.E.2d 231 (1934) (eugenics requirement); Levy v. Downing, 213 Mass. 334, 100 N.E. 638 (1913) (nonage); Mazzolini v. Mazzolini, 168 Ohio St. 357, 155 N.E.2d 206 (1958) (incestual marriage); Lyannes v. Lyannes, 137 Wis. 381, 177 N.W. 683 (1920) (eugenics and licensing law).

83. Meisenhelder v. Chicago & N.W. Ry. Co., 179 Minn. 317, 213 N.W. 32 (1927) (incestual marriage).

84. See **e.g.** Mortenson v. Mortenson, 83 Ariz. 87, 316 P.2d 1106 (1957) (The statute read: ". . . marriages solemnized in any other state or country by parties intending at the time to reside in this state shall have the same legal consequences and effect as if solemnized in this state . . ."); Johnson v. Johnson, 114 N.W.2d 8 (N.D. 1960); First National Bank v. N.D. Workmen's Compensation Bureau, 63 N.W.2d 661, 663 (N.D. 1960): "A state has the prerogative to regulate by legislation the marital status of its citizens domiciled therein to the extent of prohibiting certain marriages upon the ground of public policy and may give effect to such prohibition in nullifying a marriage performed in violation thereof though solemnized in another state."

THE INCIDENTS OF MARRIAGE

It should be observed that separate from consideration of marriage validity there is opportunity for state control of the incidents of marriage.[85] These interests arising from the marriage "status" are subject to control by the law of the state in which the incident is claimed. In the words of the Restatement:

> "If any effect of a marriage created by the law of one state is deemed by the courts of another state sufficiently offensive to the policy of the latter state, the latter state will refuse to give that effect to the marriage."[86]

In this manner, parties validly married and domiciled in one jurisdiction, upon moving to another state may find themselves subject to criminal prosecution for illicit cohabitation.[87] In addition to these incestuous and miscegenous prosecutions there is authority for denial of emancipation from guardianship where the minor validly marries in another state.[88] However, even the authority who has made the most exhaustive search and coverage of this area has failed to uncover more than a sprinkling of cases supporting this concept of restrictions upon the incidents of marriage.[89] There appear to be no recent cases effectuating this stand, and those cases of ancient lineage which provide the authority seem of limited application.

On the question of policy alone it would seem doubtful that such harsh restrictions as denial of cohabitation and emancipation should be attached to a valid marriage. The instances where such restrictions might reasonably be applied do not come readily to mind. In most circumstances it would appear that judicial decision as to validity of the marriage would be adequate solution. If a denial of personal or property rights is involved there should also arise the question and the limitation of equal protection of the law.

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85. See generally, Taintor, **What Law Governs the Ceremony, Incidents and Status of Marriage,** 19 B.U.L. Rev. 353, 357-366 (1939).
86. RESTATEMENT, CONFLICT OF LAWS § 134 (1934).
87. State v. Brown, 47 Ohio St. 102, 33 N.E. 747 (1890) (prosecution for incest was proper though the marriage was valid where celebrated) State v. Bell, 66 Tenn. 9 (1872) (allowed prosecution for illicit cohabitation though miscegenous marriage valid where celebrated).
88. Guillebert v. Grenier, 107 La. 614, 32 So. 238 (1902).
89. Taintor, **What Law Governs the Ceremony, Incidents and Status of Marriage,** 19 B.U.L. Rev. 353, 357-366 (1939); **Taintor, Marriage in the Conflict of Laws,** 9 Vand. L. Rev. 607, 614-616 (1956).

THE DEVELOPMENT OF THE LAW

While there is among the cases on the subject of marriage in the conflict of laws a strand of agreement, it is often long in the finding. Conflicting reasoning is applied even when the same result is reached and results finding substantial agreement in one area may not carry over into the next. The most consistent finding is an application of the presumption of validity as to a purported marriage. The courts are reluctant to negate a relationship upon which so many personal and governmental considerations depend. The usual basis for invalidation, "public policy", is in effect an admission of judicial failure. Judicial analysis has been able to refine the question no further than this broad term. That concept itself has been criticized as "an intolerable affection of superior virtue."[90] In the words of Judge Goodrich: ". . . the sight of the courts of one state refusing to apply the law of another because the second state's rule shocks the morals of the forum, is one to make the judicious grieve."[91] This concept is more than an exception. In its broad application it strikes at the foundations of conflicts law. It is reversion to territorial sovereignty.

The attempt at re-analysis of this area has led authorities to the earlier mentioned "intended marital domicil" rule.[92] In the tentative drafts of the second Restatement of Conflict of Laws a more closely reasoned model of this rule has found expression. Stated in essence, it is as follows:

> "A marriage is invalid everywhere, even though the requirements of the state where the marriage took place have been complied with, if it is invalid under the law of a state where at least one of the parties is domiciled at the time of the marriage and where both intend to make their home thereafter."[93]

The rule and its converse application are more variously given in other sections yet the essence of it is as stated above. The problem is broken down to its basic factor—that state having paramount interest in the relationship should govern its validity. The solution is similar to that found necessary by the American Law Institute in its second Restatement on Con-

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90. Beach, **Uniform Interstate Enforcement of Vested Rights,** 27 Yale L. J. 656, 662 (1918).
91. Goodrich, **Foreign Facts and Local Fancies,** 25 Va. L. Rev. 26, 35 (1938).
92. See note 13 **supra.**
93. RESTATEMENT (SECOND), CONFLICT OF LAWS § 134 (Tent. Draft no. 4 1957).

tracts. The validity of a contract is to be determined by the law of the state with which the contract has the most significant relationship.[94] That rule has also operated under the terminology of the "points of contact" or "center of gravity" rule as to contracts. The underlying logic is the same: the law of that state most affected should govern.

The rule as enunciated above has found no exact expression in the cases, but the principle involved has gained much support.[95] The marriage evasion statutes embody this concept of the paramount interest of the state in which the parties are domiciled and will be domiciled. The Arizona statute in fact expressly adopts an "intended marital domicil" rule.

The effect engendered through recognition of this rule would not be greatly different than present judicial decision in the various areas discussed. The effect would be closer judicial analysis of the actual interests involved and a more clear and uniform recognition of an institution necessitating certainty rather than interstate judicial dispute.

J. PHILIP JOHNSON

94. RESTATEMENT (SECOND), CONTRACTS § 332 (Tent. Draft no. 6 1960).

95. Stevens v. United States, 146 F.2d 120 (10th Cir. 1944) (Residents of the state of Oklahoma intending to return could not avoid the miscegenous marriage prohibition by their Kansas marriage.); Wilkins v. Zelichowski, 26 N.J. 370, 140 A.2d 65 (1958) (A marriage of underage New Jersey residents in Indiana upon return to New Jersey as their marital domicil would be invalidated.); Mitchell v. Mitchell, 63 Misc. 580, 117 N.Y.S. 671, 674 (1909) "The relation established by the marriage was not to be sustained in Canada, but in New York. It was intended by the parties to be carried out in the state of New York, and such contract as they made may be said to have been made by them with the view and expectation that the mutual obligations imposed should be subject to the laws of this state so far as those laws authorized a dissolution of the marriage ties by judicial proceeding for any cause. The marriage domicil of the parties is to determine the question as to whether a divorce or annulment shall be had."; Ross v. Bryant, 90 Okla. 300, 217 Pac. 364 (1923) (invalidation of marriage of returning domiciliaries); see generally Annot. 71 A.L.R.2d 687, 690-691 (1957).

96. Ariz. Rev. Stat. Ann. § 25-112 (1956) "B. Marriages solemnized in another state or country by parties intending at the time to reside in this state shall have the same legal consequences and effect as if solemnized in this state."